

April 19, 2005

BY ELECTRONIC FILING

Cathy Seidel, Acting Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: WT Docket No. 02-55  
*Ex Parte Presentation*

Dear Ms. Seidel:

Nextel Communications (“Nextel”) respectfully submits these comments in opposition to the Enhanced Specialized Mobile Radio (“ESMR”) “election” filings made by various parties in this proceeding. As described further below, each ESMR election fails to adequately demonstrate that a constructed and operational ESMR system, as defined by the FCC’s rules, existed by the Federal Communications Commission’s (“Commission”) November 22, 2004 deadline in many, if not all of the markets in which the party seeks to relocate their operations to the new ESMR block. As a result, the Commission should deny the respective ESMR elections, or, at a minimum, conduct site inspections, require additional information and, where necessary, hold evidentiary hearings prior to approval of the election.

**I. Background**

The Commission’s Report and Order,<sup>1</sup> as modified by subsequent errata and orders,<sup>2</sup> established clear and specific criteria for those parties seeking to be retuned to the new ESMR block. The Commission’s intention was to allow the retuning of only those systems that are truly low-site, high-density cellular-like operations, as distinguished from those systems that are predominantly high-site, low-density operations and do not pose the same threat of harmful interference to public safety and private wireless users in the 800 MHz band. At the same time, the Commission designed its

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<sup>1</sup> See *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, 19 FCC Rcd 14969, ¶¶ 325, 344 (2004) (“R&O”).

<sup>2</sup> See *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, Erratum (rel. Sep. 10, 2004); Second Erratum, 19 FCC Rcd 19651 (2004); Public Notice, “Commission Seeks Comment on Ex Parte Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding,” 19 FCC Rcd 21492 (2004); Third Erratum, 19 FCC Rcd 21818 (2004); Supplemental Order and Order on Reconsideration, 19 FCC Rcd 24708, ¶ 27 (2004) (“*Supplemental Order*”); Erratum, WT Docket No. 02-55 (rel. Jan. 19, 2005).

reconfiguration plan to prevent recreating an incompatible, interference-creating mix of high-density and low-density architecture operations in the new ESMR channel block.

The Commission's definition of an 800 MHz ESMR encompasses a two-part test. First, the basic requirement is that the system must be a commercial SMR system operating in the 800 MHz band.<sup>3</sup> Second, the system must employ a "cellular" architecture. A cellular architecture ESMR system is defined as a "high-density system which (1) has more than five overlapping interactive sites featuring hand-off capability; and (2) at least one site with an antenna height of less than 30.4 meters (100 feet) above ground level with an antenna height above average terrain (HAAT) of less than 152.4 meters (500 feet) and twenty or more paired frequencies."<sup>4</sup>

The retuning rights of an ESMR licensee are determined by the configuration of that licensee's network as of November 22, 2004, the publication date of the *R&O* in the Federal Register. Only those systems meeting the Commission's ESMR definition as of that date are permitted to retune to the new ESMR block. "Site-specific" channels within an ESMR network are also permitted to be retuned to the ESMR block, if those site licenses met certain requirements. In order to retune a licensed site-based facility into the ESMR segment, an incumbent licensee has to: (i) hold an EA license in the relevant market; and (ii) be using the licensed site-based facility as an integral part of its ESMR system within the relevant EA as of November 22, 2004.<sup>5</sup> To be an "integral part" of an ESMR system, a site-based license has to have a 40 dBμ/V coverage contour overlapping the 40 dBμ/V coverage contour of another cell integral to the ESMR system, and be capable of "handing off" calls to and from the cell with which its 40 dBμ/V contour overlaps.<sup>6</sup> Finally, while an incumbent that meets these criteria may retune its site-based licenses into the ESMR block, the retuned license is limited to the 40 dBμ/V coverage contour it provided as of the *R&O*'s November 22, 2004 publication date.<sup>7</sup> In summary, the basic premise of the Commission's development of these factors was to ensure that all retunees receive comparable facilities – no more and no less.

On January 6, 2005, the Transition Administrator ("TA") issued a press release seeking submissions by January 21, 2005 from those parties who believed they met the

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<sup>3</sup> See Section 90.7 of the Commission's Rules.

<sup>4</sup> See Section 90.7 of the Commission's Rules.

<sup>5</sup> *R&O* ¶ 163; *Supplemental Order* ¶ 78.

<sup>6</sup> *Supplemental Order* ¶ 78.

<sup>7</sup> *Id.*

ESMR definition and who desired to retune to the ESMR channel block.<sup>8</sup> The following parties made submissions on or about that date: Colorado CallComm, Inc.<sup>9</sup>, Preferred Communication Systems, Inc.<sup>10</sup>, Mobile Relay Associates<sup>11</sup>, Skitronics, LLC<sup>12</sup>, Western Communications, Inc.<sup>13</sup>, AIRPEAK Communications, LLC<sup>14</sup> and Airtel Wireless, LLC.<sup>15</sup>

Nextel files these comments because it is the single party most directly impacted by the ESMR elections referenced above. Nextel agreed to perform the various obligations of 800 MHz band reconfiguration and will be expending significant resources in doing so. Nextel's network and spectrum position will also be more impacted by 800 MHz band reconfiguration than any other single licensee. Nextel undertook these obligations with the understanding that legitimate non-Nextel, non-Southern LINC ESMRs could elect to retune to the ESMR block if they fully complied with the requirements specified by the Commission; Nextel did not agree to support retuning incumbents to the ESMR block who do not meet the Commission's carefully considered retuning eligibility requirements. Accordingly, Nextel requests that the Commission and the TA carefully review the ESMR election filings for compliance with the retuning eligibility requirements, taking into account Nextel's comments herein. This will help to assure that 800 MHz reconfiguration is accomplished smoothly and without adverse impact to all incumbent licensees, including Nextel.

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<sup>8</sup> See 800 MHz Transition Administrator Provides Guidance on ESMR Elections, Press Release (January 6, 2005), submitted into the Commission's record in WT Docket 02-55. On January 14, 2005, the Commission issued a Public Notice announcing the availability of the TA press release elections. See *Transition Administrator Press Release*, Public Notice, DA 05-104,

<sup>9</sup> See 800 MHz ESMR Relocation Election filed by Colorado CallComm, Inc. dated February 2, 2005. ("CallComm")

<sup>10</sup> See Notice Re 800 MHz Channel Relocation Plans filed by Preferred Communication Systems, dated January 21, 2005. ("Preferred")

<sup>11</sup> See Notice Re 800 MHz Channel Relocation Plans filed by Mobile Relay Associates, dated January 20, 2005. ("MRA")

<sup>12</sup> See Notice Re 800 MHz Channel Relocation Plans filed by Skitronics, LLC, dated January 20, 2005. ("Skitronics")

<sup>13</sup> See 800 MHz ESMR Election filed by Western Communications, Inc. dated January 19, 2005. ("Western")

<sup>14</sup> See Redacted 800 MHz ESMR Election filed by AIRPEAK Communications, LLC, dated March 16, 2005. ("AIRPEAK")

<sup>15</sup> See Redacted 800 MHz ESMR Election filed by Airtel Wireless Services, LLC, dated March 16, 2005. ("Airtel")

## **II. Analysis of CallComm's ESMR election**

CallComm's 13-page ESMR election suffers from significant deficiencies and fails to demonstrate that it meets the FCC's definition of an 800 MHz ESMR in either of the two markets in which it elects retuning to the ESMR block.<sup>16</sup>

### **A. CallComm's New Orleans ESMR Election**

CallComm's filing contains absolutely no description or documentary evidence whatsoever regarding its operations in the New Orleans market, other than providing the three call signs it seeks to retune. Based on a review of the Commission's Universal Licensing System ("ULS"), CallComm has not even certified to the construction of these licenses.<sup>17</sup> Without even the pretense of an operational system of any kind, the Commission must deny CallComm's ESMR election for this market.

Even if CallComm were to provide "supporting information" now, six months after the Commission's November 22, 2004 deadline for establishing the construction of an ESMR system, CallComm, at best, is licensed for only 15 channels in the entire New Orleans EA.<sup>18</sup> Therefore, it is impossible for CallComm to meet the Commission's requirement that it be operating more than twenty 800 MHz channels at one low-antenna height site within a larger cellular network in that EA. For these reasons, the Commission must deny CallComm's retuning request for New Orleans.

### **B. CallComm's Denver ESMR Election**

CallComm's Denver ESMR election barely provides more information than its deficient New Orleans showing. CallComm lists one five-channel 800 MHz EA license

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<sup>16</sup> CallComm's filing lists two markets for which it seeks to relocate to the 800 MHz ESMR block: EA141 (Denver, CO) and EA083 (New Orleans, LA).

<sup>17</sup> CallComm is licensed for 3 Economic Area ("EA") licenses, each containing 5 channels, in the New Orleans EA. According to the ULS, CallComm has not yet met the Commission's build-out requirements for these licenses. In March 2004, CallComm did not certify that it had constructed and begun and operation, but instead elected to make a "substantial service" showing by the end of its five-year build out period in March 2006.

<sup>18</sup> In fact, while CallComm has EA authority for 15 channels in the New Orleans EA, the spectrum is heavily encumbered with existing operational systems, which must be fully protected from co-channel interference. Nextel's extensive experience suggests that it would be nearly impossible to build and operate an ESMR network on the limited slivers of unencumbered spectrum available in that market.

for EA141, WPSA491, and five site-specific licenses totaling ten channels at various locations in Colorado that it seeks to retune to the ESMR block.<sup>19</sup> CallComm's showing fails to demonstrate that it has met any of the Commission's ESMR requirements.

First, the Commission requires that an ESMR system be an 800 MHz ESMR system. It appears that CallComm's "network" is not an 800 MHz network at all but rather is some kind of hybrid system. To demonstrate that it meets the Commission's requirement that it operate at least twenty-channels at one low site, CallComm lists 21 paired frequencies at the CallComm Mobile Central Office site: ten 900 MHz channels, two 75 MHz channels, two 150 MHz channels, in addition to seven 800 MHz channels. A fundamental aspect of the Commission's ESMR definition is that the system be an 800 MHz system, not a system using frequencies throughout the radio spectrum band. Further, CallComm provides no explanation for how a combined 800 MHz, 900 MHz, 150 MHz and 75 MHz system, all with different technical and propagation characteristics and equipment requirements, works together interactively or how a customer's handset would seamlessly jump from frequency band to frequency band or from site-to-site within the network. Failure to meet this threshold 800 MHz requirement warrants dismissal of CallComm's Denver ESMR block retuning election.

Furthermore, notwithstanding the above, CallComm does not meet the Commission's requirements regarding "cellular" architecture. To meet the Commission's definition of a "high-density" cellular system, CallComm is required to demonstrate that it has a multi-site 800 MHz system, and that at least one site of more than five-overlapping sites, each featuring hand-off capabilities, has an antenna height of less than 100 feet and operates more than twenty paired 800 MHz channels at one of the overlapping sites.

CallComm claims that it is operating a "high-density" ESMR system with 12 "interactive" sites, which appear to cover over 175 miles of territory from well north of Denver in Fort Collins, all the way to Pueblo, but provides no information to verify this conclusion. Other than one site in Denver, discussed further below, CallComm provides *no information* on the technical parameters, addresses, coordinates, the ERP, the HAAT, the antenna heights, or 800 MHz channels that are in use at *any* of the sites that allegedly comprise its network. Without the above-listed technical information, CallComm's "engineering showing" – merely a map allegedly depicting 40 dBu service contours for its unspecified sites -- cannot be verified by the Commission. CallComm also provides

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<sup>19</sup> CallComm's Pueblo site, call sign WPZY509, cannot be relocated to the ESMR block as part of CallComm's "system". This site is outside of Denver EA141, and the Commission's rules require that site-specific licenses can only be retuned to the ESMR block if there is an associated EA license in the same EA. See Supplemental Order at paragraph 78. CallComm does not own any EA licenses for EA140 – the EA in which WPZY509 is located.

no explanation of the technology it is using, how its network “hands-off” from site to site or how it is “interactive.”<sup>20</sup>

As described above, CallComm appears to operate some kind of combined system – not an 800 MHz system, and thus it does not operate on twenty 800 MHz channels at the CallComm Mobile Central Office. Further, there is no verification that the CallComm Mobile Central Office site is a “low-site” (i.e., less than 100 feet) pursuant to the Commission’s requirements. With no coordinates, no statement from the tower owner, no evidence of a lease, no antenna registration information, neither Nextel nor the Commission can verify whether the CallComm site is in fact less than 100 feet – even if it were comprised of 800 MHz channels.

Nextel also believes that at least two of the 800 MHz channels allegedly in use at the CallComm Mobile Central Office are not operating in compliance with the Commission’s rules and should not be counted. Two of the 800 MHz frequencies listed at CallComm Mobile Central Office site (853.0375, pursuant to WNXS842) and (857.8125 MHz pursuant to WPUR767) are non-exclusive “shared” channels. Thus, neither channel can be operated in the trunked format with other 800 MHz channels that CallComm appears to operate its network and which are necessary to operate a cellular-like network. Further, channel 857.8125 MHz is not authorized for commercial use, but for private internal use only, and therefore cannot legally be part of a commercial ESMR network. Call sign WPUR767 is a business pool internal-use only conventional channel, which has not (and cannot) be modified to provide commercial services until at least 2008.<sup>21</sup>

Thus, CallComm’s Denver ESMR showing lacks all of the necessary elements to establish an existing ESMR under the Commission’s rules. CallComm does not operate an 800 MHz-only network; CallComm does not operate at least twenty 800 MHz

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<sup>20</sup> CallComm’s “Certificate of Hand-Off” neither describes how the “hand-off” process is performed nor does it explain how a network with 800 MHz, 90 MHz, 150 MHz and 75 MHz channels works as an integrated network.

<sup>21</sup> It also appears that if these two channels are indeed operating at this site, CallComm violated the Commission’s rules by not properly modifying the licenses to reflect their current location. Furthermore, CallComm may be violating the Commission’s commercial operation rules on at least three other channels within its “network.” Call sign WPZY509 (855.7625 MHz), which CallComm claims is operating in Pueblo, Colorado is also a private, internal-use only channel that cannot be used for commercial services. Similarly, call sign WPZH447 in Colorado Springs, CO on channels 854.8375 MHz and 855.0215 MHz is licensed as a YB (trunked business pool) station and cannot be used for commercial services. Each of these licenses were applied for 2003, pursuant to the requirements that they be used for private internal use only communications and cannot be converted to commercial operations until 2008.

channels at one-site within its network<sup>22</sup>; CallComm does not show how any of the sites are less than 100 feet; and CallComm does not provide sufficient information to verify that the network's sites overlap or have "handoff" capabilities. For all of these reasons, CallComm's "election" to retune to the 800 MHz ESMR block must be denied.

### III. Analysis of Preferred Communication Systems ESMR Election

Preferred's January 21, 2005 ESMR "election" suffers from significant deficiencies and fails to demonstrate that it meets the FCC's definition of an 800 MHz ESMR in any of the markets in which it elects to retune to the ESMR block.

Preferred *admits* that it was not "operating an ESMR", as defined by the Commission's Rules by the Commission's November 22, 2004 deadline in EA013 (Washington, DC), EA015 (Richmond, VA), EA016 (Staunton, VA), EA17 (Roanoke, VA), EA48 (Charlestown, WV), EA164 (Sacramento, CA), EA165 (Redding, CA), and EA174 (Puerto Rico).<sup>23</sup> At the same time, however, Preferred appears to request that its site-based licenses in EA174 (Puerto Rico) be retuned to either the new ESMR block or the new non-cellular block adjacent to the ESMR block, as Preferred may elect in the future, depending on Commission resolution of pending petitions for reconsideration in this proceeding. Only existing ESMRs have the right to make that election and Preferred's filing fails to demonstrate that it is an ESMR in Puerto Rico. Preferred's filing contains no description or information regarding the number of operational sites that it has today in Puerto Rico --- it merely lists twenty-one GX call signs it claims to own in one EA block in Puerto Rico. Preferred's filing does not demonstrate operation on at least twenty 800 MHz channels at one site within its "network"; Preferred does not show how any of the sites within this "network" are less than 100 feet; and Preferred does not provide sufficient information to verify that any of the sites overlap or have "handoff" capabilities. For all of these reasons, Preferred's "election" to retune its own site-specific channels in Puerto Rico to the 800 MHz ESMR block should be denied.

Preferred's showing also appears to contain significant misrepresentations. At page two of its filing, apparently seeking to use another licensee's system to justify its own "operations", Preferred claims that it holds "constructive ownership" of North Sight Communications, Inc. and Trunked Systems PR, Inc. (collectively "North Sight") 800 MHz licenses and that North Sight built and operates an ESMR system.

North Sight, *the actual licensee of the 800 MHz spectrum at issue*, directly contradicts these claims. A letter to the TA (and filed in the Commission's docket in this proceeding), dated January 28, 2005, indicates it "does not presently meet the Commission's definition of a 'high-density' cellular system" and that it should "not

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<sup>22</sup> In fact, CallComm does not own or operate twenty 800 MHz channels in the entire Denver market.

<sup>23</sup> Preferred's filing, therefore, appears to be requesting that the TA retune its EA licenses to the ESMR block pursuant to its rights as an EA licensee – not as an ESMR licensee. The opportunity to make that election, however, has not yet occurred and therefore must be denied.

presently be classified as an ‘high density ESMR.’” North Sight also details the alleged “ownership” by Preferred showing that while a contractual relationship existed between the parties, the parties have not consummated their transaction and that, in fact, the Commission has dismissed the applications seeking assignment of certain licenses. For these reasons, the facilities owned and operated by North Sight (which do not currently meet the Commission’s definition of an ESMR), should not be permitted to retune to the ESMR block.

Preferred also seeks to “elect” to retune to the ESMR block another 800 MHz “acquisition”; however, this request must also be denied. Preferred claims that in March 2001, it “reached an agreement” to purchase 800 MHz spectrum held by an unnamed licensee. Based on the call signs Preferred provided, that licensee is Crown Castle. Nowhere on the Commission’s ULS does it indicate that Preferred has filed for prior Commission approval of an assignment of authorization of the Crown Castle facilities, nor has Crown Castle provided any indication of its involvement in this arrangement. Without such evidence, the Commission cannot treat Crown’s facilities as part of any ESMR election by Preferred. In any case, as Preferred admits, Crown’s facilities do not meet the Commission’s definition of an ESMR and Preferred makes no attempt to demonstrate that they do.<sup>24</sup>

#### **IV. Analysis of Mobile Relay Associates ESMR Election**

In its, January 20, 2005 filing, Mobile Relay Associates (“MRA”) admits that it is a site-based licensee that does not operate an ESMR system pursuant to the Commission’s rules.<sup>25</sup> Still MRA requests that the TA ensure that its band reconfiguration plan “accommodate the relocation of MRA’s 800 MHz spectrum into either the new ESMR block, or into the band immediately adjacent to the new ESMR band, as MRA may elect in the future, depending” on the outcome of its appeal to the U.S. Court of Appeals.<sup>26</sup>

MRA’s request should be denied. As a site-specific licensee, MRA does not have the option to elect to retune to the ESMR block. MRA may move to the “Guard Band”,

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<sup>24</sup> “Preferred does not contend that this 800 MHz SMR licensee was operating an ESMR system (as defined by the Commission in its First Report and Order) as of November 22, 2004.” Preferred at page 3. This is confirmed by facts from the Commission’s ULS. Each of Crown’s sites, of which there are only three – not the more than five required – have antenna heights of more than 100 feet and therefore do not meet the Commission’s definition. Strangely, Preferred appears to argue that because Crown Castle once received Extended Implementation Authority (“EIA”) for construction purposes it somehow converts their site-specific licenses to an EA license deserving of specialized retuning rights.

<sup>25</sup> See MRA filing at page 1.

<sup>26</sup> See MRA filing at page 2.



the band adjacent to the ESMR block, but such determinations will be addressed and resolved during the contract negotiations for band reconfiguration in MRA's market.<sup>27</sup>

## **V. Analysis of Skitronics ESMR Election**

In its January 20, 2005 filing, Skitronics, LLC ("Skitronics") admits that it holds EA and site-based licenses, but that it does not operate an ESMR system pursuant to the Commission's rules.<sup>28</sup> Still Skitronics requests that the TA ensure that its rebanding plan "accommodate the relocation of all of Skitronics's 800 MHz spectrum into either the new ESMR band, or into the band immediately adjacent to the new ESMR band, as Skitronics may elect in the future, depending" on the outcome of its appeal to the U.S. Court of Appeals.

Skitronics's request should be denied. Under the Commission's rules, only existing ESMR operators have the opportunity to choose to retune to the ESMR block. Skitronics admits that it does not meet the Commission's definition. While it may have certain rights as an EA licensee to elect to retune certain of its spectrum to the ESMR block, the TA has not yet invited such elections. Accordingly, the instant Skitronics request should be denied.

## **VI. Analysis of Western Communications ESMR Election**

Western Communications, Inc.'s ("Western") January 19, 2005 filing requests that its 800 MHz EA licenses in South Dakota be relocated to the ESMR block. Western did not request relocation of any site-specific licenses, only its EA licenses. Western admits that it is not yet operating a "high-density" system, and is not an ESMR. Therefore, while it may have certain rights as an EA licensee to elect to retune certain of its spectrum to the ESMR block, the TA has not yet invited such elections. Accordingly, the instant Western request should be denied.

## **VII. Analysis of AIRPEAK's ESMR Election**

On January 21, 2005, AIRPEAK Communications, LLC ("AIRPEAK") filed its ESMR election with the TA and the Commission. AIRPEAK's request was filed with a request for confidentiality, denying Nextel and any other interested parties the opportunity to review the filing. Two months later, on March 16, 2005, AIRPEAK filed with the Commission a redacted version of its January 21, 2005 ESMR election,

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<sup>27</sup> Nextel notes that under the Commission's *R&O*, as amended, it would not be *required* to retune, at its expense, all of MRA's facilities to the Guard Band, only those that require retuning (i.e., channels 1-120).

<sup>28</sup> See Skitronics filing at page 1.

continuing to hide pertinent information regarding its system. In yet another bite at the apple, late last week, on April 13, 2005, AIRPEAK filed a supplemental filing.<sup>29</sup>

AIRPEAK faces the burden of proof in this matter and AIRPEAK has not met its burden or demonstrated that it operated an ESMR system in compliance with the FCC's definition by the Commission's applicable deadline in any of the markets discussed below. The Commission should closely examine AIRPEAK's repeated incomplete submissions. The ESMR election is not an evolving process – it is a factual determination that must be based on AIRPEAK's compliance with the Commission's ESMR election standard by the Commission's November 22, 2004 deadline. AIRPEAK's repeated filings cannot change the basic facts as of November 22, 2004, the date on which this decision must be based.

**A. A Market-By-Market Review Is Necessary to Determine Whether AIRPEAK is An ESMR In Each Market**

AIRPEAK attempts to elect to retune to the ESMR block in every market where it has a license of any kind, with all of its licenses, regardless of its non-compliance (or lack of demonstration) with the Commission's specific cellular architecture standards. Each of AIRPEAK's markets must be examined individually to determine whether the AIRPEAK licenses in each separate market qualify as an ESMR system for retuning purposes. Assuming an ESMR exists in any one market (for example, Reno, NV), does not demonstrate that AIRPEAK meets the Commission's ESMR election standard in Alaska, California, Oregon or New Mexico.

Overall, AIRPEAK provides no information sufficient to verify its conclusion that it meets the Commission's ESMR definition in *any* of its markets. AIRPEAK provides no information on the technical parameters, addresses, coordinates, the ERP, the HAAT, the antenna heights, or 800 MHz channels that are in use at *any* of the sites that allegedly comprise its network, making it impossible to confirm whether AIRPEAK's "network" of sites truly justifies an ESMR designation for relocation purposes in *any* of the markets in which it seeks such treatment. Without the above-listed technical information, AIRPEAK's "engineering showing" – merely a map allegedly depicting 40 dBu service contours for its unspecified sites in *one* market, when it claims relocations rights in *over twenty well separated markets* -- cannot be verified by Nextel or the Commission.

AIRPEAK's own website ([www.airpeak.com](http://www.airpeak.com)) illustrates that it is not an ESMR network in a number of markets. AIRPEAK's website is notable for its omissions. AIRPEAK provides no information on its alleged ESMR service in San Francisco, Sacramento, Portland, Springfield, Hobbs, Amarillo, Idaho Falls, Flagstaff, Farmington, El Paso, Fresno, Redding, and Anchorage.<sup>30</sup> AIRPEAK's own admissions should be

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<sup>29</sup> Nextel may respond further to AIRPEAK's supplemental filing after it has had a fair opportunity to review it.

<sup>30</sup> See <http://www.airpeak.com/coverage.fx>. (As viewed on April 5, 2005).

taken as *prima facie* evidence that it does not operate an ESMR network in these markets.<sup>31</sup> In still other markets, such as Eugene/Medford and Richland, AIRPEAK's website contains a link inviting consumers to obtain information and service in these markets, yet the AIRPEAK website merely says "Coming Soon", which certainly implies that there is no operational network in those markets today.<sup>32</sup>

**B. AIRPEAK Provides No Information In The Following Markets and Therefore Fails to Demonstrate Compliance With the Commission's Requirements**

AIRPEAK provides *absolutely no information* regarding its qualifications for the ESMR election in the following markets, other than providing the call signs it seeks to retune:

EA094 Springfield, MO  
EA136 Hobbs, NM  
EA138 Amarillo, TX  
EA139 Santa Fe, NM  
EA148 Idaho Falls, ID  
EA154 Flagstaff, AZ  
EA155 Farmington, NM  
EA156 Albuquerque, NM  
EA157 El Paso, TX  
EA162 Fresno, CA  
EA165 Redding, CA  
EA171 Anchorage, AK

Nextel notes that AIRPEAK is licensed for only a five-channel EA license in EA162 (Fresno) and EA165 (Redding). As a result, AIRPEAK will be unable to show as a factual matter that it operated a low site network with one site utilizing more than twenty channels in that EA, given it is licensed for only five channels in the whole EA. Accordingly, AIRPEAK's ESMR election for all of the above-listed markets must be denied for failure to provide any information to demonstrate an ESMR existed in November 2004.

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<sup>31</sup> At the same time, however, Nextel does not concede that because in some markets AIRPEAK shows a coverage map on its website that AIRPEAK operates an ESMR network that meets the Commission's definition.

<sup>32</sup> <http://www.airpeak.com/rates.fx>. (As viewed on April 5, 2005)

### **C. Markets Where AIRPEAK Fails to Demonstrate Compliance With the Commission's Requirements**

AIRPEAK provides little to no information, other than providing the call signs it seeks to retune, some standardized boilerplate footnotes which contain no substantive explanation and an unlabeled, unverifiable contour map. AIRPEAK has not met its burden of demonstrating that it had built and was operating an ESMR in these markets as of November 22, 2004.

#### **1. EA147 (Spokane)**

In Spokane, for example, AIRPEAK's election to be treated as an ESMR completely ignores the Commission's requirements. AIRPEAK lists one EA license and one site-specific license it seeks to relocate to the ESMR block, but provides no showing that this market meets the clearly articulated criteria provided by the Commission necessary to justify retuning to the ESMR block. While AIRPEAK provides a contour map, it does not provide sufficient information on which to verify any facts that would be required to demonstrate an ESMR in this market.

#### **2. EA163 (San Francisco)**

Similarly, in its showing for San Francisco, AIRPEAK ignores the Commission's requirements.

- AIRPEAK lists a five-channel EA license and a one-channel license for a total of six channels in the EA that it seeks to relocate to the ESMR block. Therefore, AIRPEAK cannot satisfy the Commission's requirement that it operates 20 channels at one low site within the EA.
- AIRPEAK's "map" shows at best, three operating sites in the EA – not the more than five required for a cellularized ESMR deployment.
- Further, AIRPEAK admits that the "site-specific" license that it seeks to retune to the ESMR block is not presently in operation as part of an ESMR network, stating that the one-channel license is "being transitioned from analog to ESMR operation as analog customers are migrated." The Commission's requirement is that all site-specific facilities be integral to the ESMR network in that market by the applicable November 22, 2004 deadline. *Ongoing transition* of customers from an analog network is obvious evidence that this facility was not part of a high-density ESMR network as of November 22, 2004. In addition, without any documentation, it is impossible to verify AIRPEAK's statement that the one-channel license "meets 40 dBu/V contour overlap standard." Interestingly, the call sign's location information provided in the

Commission's ULS indicates that this site is a 21m tower on a mountain with a HAAT of 753 feet -- not a "low-site" As set forth in the Commission's Rules.<sup>33</sup>

### **3. EA164 (Sacramento)**

In Sacramento, AIRPEAK again wholly ignores the Commission's requirements. AIRPEAK provides no showing that this market meets the specific criteria provided by the Commission.

### **4. EA166 (Eugene, OR)**

In Eugene, OR AIRPEAK ignores the Commission's requirements and provides no showing that this market meets the specific criteria provided by the Commission. Further,

- AIRPEAK admits in a footnote that three of its licenses are not presently in operation as part of an ESMR network, stating that the stations are "being transitioned from analog to ESMR operation as analog customers are migrated."<sup>34</sup> The Commission's requirement is that all site-specific facilities be integral to the ESMR network in that market by the applicable November 22, 2004 deadline. Ongoing transition of customers from an analog network is obvious evidence that these facilities were not part of a high-density ESMR as of November 22, 2004. In addition, without any documentation it is impossible to verify AIRPEAK's statement that the facility "meets 40 dBu/V contour overlap standard."
- AIRPEAK's map shows that at best only two sites are operational in the EA – not the more than five sites that are required. The map also demonstrates that the two sites do not overlap and therefore do not "hand off", demonstrating that AIRPEAK does not meet the ESMR standard in this market.

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<sup>33</sup> According to AIRPEAK, this one-channel license was the subject of a spectrum lease in November 2004 and was not owned by AIRPEAK as of the Commission's November 22, 2004 deadline. In other markets AIRPEAK has requested waiver relief from the Commission's requirements that it be the owner of the facilities in the ESMR network by the applicable deadline and Nextel has opposed that request. It does not appear, however, that AIRPEAK sought waiver relief for this channel.

<sup>34</sup> According to AIRPEAK's request for rule waiver, filed March 17, 2005, these licenses will not be deployed in an ESMR network until late 2005, well after the Commission's November 22, 2004 ESMR deadline.

## **5. EA167 (Portland, OR)**

In Portland, OR, AIRPEAK admits that the one site-specific license it seeks to relocate to the ESMR block is not presently in operation as part of an ESMR network, stating “ESMR construction not yet scheduled.” The Commission’s requirement is that all site-specific facilities be integral to the ESMR network in that market by the applicable November 22, 2004 deadline, which it clearly has not done.<sup>35</sup> In addition, without any documentation it is impossible to verify AIRPEAK’s statement that the facility “meets 40 dBu/V contour overlap standard.” Finally, AIRPEAK’s map shows that at best only three sites are operational in the EA – not more than five sites -- a necessary requirement to demonstrate an ESMR.

## **6. EA168 (Pendleton, OR)**

In Pendleton, OR, AIRPEAK admits that the one site-specific call sign it seeks to relocate is not presently in operation as part of an ESMR network, stating “ESMR construction not yet scheduled.” AIRPEAK’s election to be treated as an ESMR in this market completely ignores the Commission’s requirements. The Commission’s requirement is that all site-specific facilities be integral to the ESMR network in that market by the applicable November 22, 2004 deadline, which is not the case here. In addition, without any documentation it is impossible to verify AIRPEAK’s statement that the facility “meets 40 dBu/V contour overlap standard.” Finally, AIRPEAK’s map shows that at best only two sites are operational in the EA – not more than five sites -- a necessary requirement to demonstrate an ESMR.

## **7. EA169 (Richland – Kennewick, WA)**

In Richland – Kennewick, WA, AIRPEAK admits that the one site-specific call sign it seeks to relocate is not presently in operation as part of an ESMR network, stating that “ESMR deployment in progress.”<sup>36</sup> AIRPEAK’s election to be treated as an ESMR in this market completely ignores the Commission’s requirements. All site-specific facilities be integral to the ESMR network in that market by the applicable November 22, 2004 deadline and that the ESMR be operational by November 22, 2004. In addition, without any documentation it is impossible to verify AIRPEAK’s statement that the facility “meets 40 dBu/V contour overlap standard.” Finally, AIRPEAK’s map shows

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<sup>35</sup> With the removal of this five-channel license from AIRPEAK ESMR election, AIRPEAK cannot satisfy the twenty-channel minimum usage requirement at any location with the EA, as it would be licensed for at best three five-channel EA blocks.

<sup>36</sup> AIRPEAK’s filing provides no indication what “in progress” means. Apparently “in progress” means summer 2005, as shown in its March 17, 2005 request for rule waiver at Attachment C, months after the Commission’s November 22, 2004 deadline.

that at best only *one site* is operational in the EA – not more than five sites -- a necessary requirement to demonstrate an ESMR.

#### **8. EA151 (Las Vegas, NV)**

In Las Vegas, NV, AIRPEAK again provides no information regarding its deployment other than a list of call signs and two unlabeled maps neither of which provides sufficient information on which to base an ESMR election.<sup>37</sup>

#### **9. EA153 (Reno, NV)**

AIRPEAK provides information regarding its network in Reno, Nevada (EA151); however, the information provided is insufficient to establish AIRPEAK's ESMR retuning rights.

- First, AIRPEAK provides no details on the sites it claims provide overlapping coverage and that provide “handoff” other than a non-descriptive map and a spreadsheet.
- Second, AIRPEAK does not certify that it is actually operating twenty channels at any of the listed sites; it merely states that it has twenty channels “available” at each site. The Commission’s ESMR definition includes a requirement that a minimum of twenty channels be in use because that is a reasonable determination for the number of channels at a given site that when operated together have the potential to cause interference. In addition, operation of less than twenty channels at a given site tends to show that AIRPEAK may not have the density or channel use that would be found in a full ESMR system.
- Via a footnote, AIRPEAK admits that one of its licenses is not presently in operation as part of an ESMR network, stating that the station is “being transitioned from analog to ESMR operation as analog customers are migrated.” The Commission’s requirement is that all site-specific facilities be integral to the ESMR network in that market by the applicable November 22, 2004 deadline. Ongoing transition of customers from an analog network is evidence that this channel was not part of a high-density ESMR as of November 22, 2004. In addition, without any documentation, it is impossible to verify AIRPEAK’s statement that the facility “meets 40 dBu/V contour overlap standard.”

For all of these reasons, AIRPEAK’s ESMR elections should be denied.

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<sup>37</sup> Nextel notes that in AIRPEAK’s request for rule waiver, it lists 12 licenses it seeks to retune to the ESMR block, but that they are not constructed in ESMR today and may not be until mid-2005, well after the Commission’s November 22, 2004 deadline.

## VIII. Analysis of Airtel's ESMR Election

On January 21, 2005, Airtel filed its ESMR election with the TA and the Commission. Airtel's request was filed with a request for confidentiality, denying Nextel and any other interested parties the opportunity to review the filing. Two months later, on March 16, 2005, Airtel filed with the Commission a redacted version of its January 21, 2005 ESMR election, continuing to hide pertinent information regarding its system. In yet another bite at the apple, late last week, on April 13, 2005, Airtel filed a supplemental filing.<sup>38</sup>

Airtel, like all other parties making an ESMR "election" faces the burden of proof in this matter and Airtel has not met its burden with an adequate demonstration that it operated an ESMR system in compliance with the FCC's definition on November 22, 2004. In addition, the Commission should closely examine Airtel's incomplete submissions, which repeatedly withhold information, and then multiple attempts to supplement its filings to continually modify its story. The ESMR election is not an evolving process – it is a factual determination that must be based on the Commission's November 22, 2004 deadline. Parties should not be permitted to repeatedly cure defects in their submissions as way to improve upon incomplete original filings.

Nextel does not dispute that Airtel may have rights as an EA licensee to elect to retune to the ESMR block in certain of its EAs. Nextel is concerned, however, that Airtel's showing does not demonstrate an ESMR system existed by the Commission's deadline that met the Commission's definitions and therefore Airtel's retuning rights should not include retuning of its site-specific facilities.

Like AIRPEAK, Airtel attempts to elect to retune to the ESMR block in every market where it has a license of any kind, with all of its licenses, regardless of its non-compliance with Commission's specific cellular architecture standards.

Airtel provides no information to verify its conclusion that it meets the Commission's ESMR definition and in the one case that it provides *something*, Airtel actually demonstrates that it does not meet the Commission's requirements.

Airtel provides *no information* on the addresses, coordinates, the ERP, the HAAT, the antenna heights, or 800 MHz channels that are in use at *any* of the sites that allegedly comprise its network, making it impossible to confirm whether Airtel's "network" of sites truly justifies an ESMR designation for relocation purposes. Without the above-listed technical information, Airtel's "engineering showing" – merely a map allegedly depicting 40 dBu service contours for its unspecified sites -- cannot be verified by Nextel, TA or the Commission.

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<sup>38</sup> Nextel may respond further to Airtel's supplemental filing after it has had a fair opportunity to review it.



### **1. EA 144 (Billings, MT)**

In Billings, MT, Airtel's provided contour map appears to claim that it operates five overlapping sites. As described above, Airtel provides no information that would confirm this claim. Further, Airtel provides only the bare assertion that one of the five sites meets the Commission's high-density configuration requirements of 100 feet or less and more than twenty channels. This is particularly troubling given that the site used to justify this claim, the "Shorey" site, has a very large 40 dBu contour, which belies the fact that the site is a low site of 100 feet or less. More importantly, however, and as a threshold matter, Airtel's Billings network does not show that it has *more than* five overlapping sites necessary to demonstrate an ESMR, as it shows just five sites.

### **3. EA 145 (Great Falls)**

Similarly, in Great Falls, MT, Airtel provides no information to justify its claim of an ESMR network. In fact, Airtel's contour map shows *two sites* in the EA and Airtel makes no mention of the Commission's twenty-channel requirement or low-site requirement in this market.

### **3. EA146 (Missoula, MT)**

Finally, for Missoula, MT, Airtel provides absolutely no information whatsoever regarding its deployment.

For all of these reasons, Airtel's request to be relocated to the ESMR block in these markets should be denied.

## **IX. Conclusion**

The basic premise of the Commission's decision was to ensure that all retunees receive comparable facilities – no more and no less. Nextel does not object to legitimate ESMR operations being retuned to the ESMR block, as doing so will prevent interference to public safety operations in the newly reallocated 800 MHz band. *Under the Commission's rules, however, retuning rights are restricted to operations that meet the Commission's clearly articulated standard.* As the analysis above demonstrates, the licensees that have requested retuning to the ESMR block have not met their burden of demonstrating operation of an ESMR system in each of their respective markets by the Commission's applicable deadline. Therefore, and for the reasons provided above, each election request should be rejected.

*Cathy Seidel, Acting Chief*

*April 19, 2005*

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Pursuant to section 1.1206(b)(2) of the Commission's rules, 47 C.F.R. § 1.1206(b)(2), this letter is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Sincerely,

[/s/ James B. Goldstein](#)

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